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A GILBERT D'CRUZ v. SAPURAACERGY SDN BHD & ANOR

COURT OF APPEAL, PUTRAJAYA
HAS ZANAH MEHAT JCA
HADHARIAH SYED ISMAIL JCA
MOHD SOFIAN ABD RAZAK JCA

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[CIVIL APPEAL NO: W-01(A)-277-06-2020]
30 SEPTEMBER 2021

Abstract – *A contract of employment, despite being spelt out as a fixed term contract, is in effect a permanent employment, where the fixed term contract has been renewed successively without application by the employee and without any intermittent breaks and also where the nature of the employment is not temporary or project-based.*

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LABOUR LAW: *Employment – Contract of employment – Whether genuine fixed term contract or permanent employee – Fixed term contract with automatic renewal without intermittent breaks – Whether employee appointed for specific project or all projects of employer – Whether employee treated as permanent employee – Whether successive renewal of contract without application by employee showed employment intended to be permanent*

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The appellant started his employment with the first respondent on 15 May 2007 as a personnel coordinator Sapura 3000 on a fixed term contract of one year. The said contract was renewed four times before its expiry or about to expire. This was followed by three further renewal, after the expiry of the contract and the period of employment was backdated. On 26 November 2015, the appellant received a letter from the first respondent stating his contract will expire on 1 December 2015 and that his last day of work was 30 November 2015. In reply, the appellant sent an email to the first respondent's director, enquiring about his termination benefit as he claimed he had worked with the company for more than 24 months and was, thus, a permanent employee. There was no response from the first respondent. The appellant, subsequently, made a representation to the Industrial Relation Department after which, his representation was referred to the Industrial Court ('IC') under s. 20(3) of the Industrial Relations Act 1967 by the Minister of Human Resources. The appellant contended that his contract of employment was not a genuine fixed term contract as his contract was renewed automatically and consecutively for seven years and therefore, his dismissal was without just cause and excuse. The appellant sought reinstatement with other termination benefits. The IC held that the appellant's contract of employment, as well as the subsequent seven extensions, were genuine fixed term contracts. Dissatisfied, the appellant filed a judicial review application, under O. 53 r. 3 of the Rules of Court 2012, to quash the IC's award. The High Court found that there was no error

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in IC's decision that the question of whether there was a dismissal did not arise because of its findings that the fixed term contract of employment was genuine. Hence, this appeal. The sole issue in this appeal was whether the appellant was a permanent employee of the first respondent or was he employed on a fixed term contract.

Held (allowing appeal)
Per Hadhariah Syed Ismail JCA delivering the judgment of the court:

(1) It was not disputed that (i) the appellant's contract of employment was renewed continuously and consecutively from 2008 to 2015; (ii) all the renewals were done automatically by the first respondent without the need of the appellant making the application; and (iii) although the period of the renewal was not uniform, in that, the renewal ranges from one month to 46 months, the renewals were backdated and had the successive effect. These undisputed facts were not considered at all by the IC. Instead, the second respondent had taken into consideration irrelevant points, namely the appellant knew and understood his contract of employment stated that it was a fixed term contract. The approach adopted by the IC was plainly wrong. (paras 35 & 36)

(2) The IC's finding that the period of renewal ranging from one month to 46 months, which showed that the appellant's nature of employment was project-based, was not supported by any evidence. The appellant was not employed for any specific project. Instead, he was involved in all the first respondent's project, both locally and oversea. Thus, this was an error of facts by the IC. (para 37)

(3) From 1 February 2009 to 26 November 2012, a period of 45 months, the appellant was able to continue his employment without any contract. To allow the appellant to continue working in the absence of a contract for such a long period showed that the first respondent had treated the appellant as its permanent employee. Further, there were plans by the first respondent's top management to absorb the appellant as a permanent employee. Although the plan did not materialise, it showed that the first respondent did not only require the appellant's services, but also acknowledged that the appellant's nature of employment was not temporary or project-based. This explained why the appellant had been in the employment of the first respondent for eight years from 2007 to 2015. (para 38)

(4) The High Court Judge erred in law and in fact in holding that the IC had taken into consideration relevant facts and arrived at a correct decision. Based on the facts and circumstances of this case and applying the law as enunciated in *Ahmad Zahri Mirza Abdul Hamid v. AIMS Cyberjaya Sdn Bhd*, the appellant was a permanent employee of the first respondent and his contract of employment was not a genuine fixed term contract. Hence, the order of the High Court was set aside and award of the IC quashed. (para 39)

A **Case(s) referred to:**
Ahmad Zahri Mirza Abdul Hamid v. AIMS Cyberjaya Sdn Bhd [2020] 6 CLJ 557 FC ***(foll)***

Legislation referred to:
Industrial Relations Act 1967, s. 20(3)
Rules of Court 2012, O. 53 r. 3

B *For the appellant - Asmawi Ismail; M/s I Asmawi & Co*
For the 1st respondent - Edward Saw Keat & Low Kok Kiang; M/s Josephine LK Chow & Co

[Editor's note: For the High Court judgment, please see A Gilbert D'cruz v. Sapuraacergy Sdn Bhd & Anor [2020] 1 LNS 1971 (overruled).]

C *Reported by S Barathi*

JUDGMENT

Hadhariah Syed Ismail JCA:

D **Introduction**

[1] This is the appellant's appeal against the decision of the High Court dated 20 May 2020, dismissing the appellant's application for a *certiorari* order to quash the award of the Industrial Court No. 76 of 2019 dated 7 January 2019.

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[2] The issue before the Industrial Court and the High Court is whether the appellant's contract of employment is a genuine fixed term contract or not.

F **[3]** Both the Industrial Court and the High Court found the appellant's contract of employment is a genuine fixed term contract and thus, his dismissal was lawful.

[4] On 20 May 2020, in the Civil Appeal Case No. 02(f)-11-02-2019(W) between Ahmad Zahri Mirza Abdul Hamid and AIMS Cyberjaya Sdn Bhd, the Federal Court held that a contract of employment which is renewed successively without application by the employee and without any intermittent breaks in between is a permanent employment.

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[5] The Industrial Court could not apply the law in *Ahmad Zahri* 's case as its decision was made on 27 August 2018, long before the Federal Court's decision. Likewise, the High Court could not be faulted for not following the Federal Court's decision because the grounds of judgment of the Federal Court was not available when the High Court deliver its decision on 20 May 2020.

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[6] When the appeal came up before us, the grounds of judgment of the Federal Court was available in the reported case of *Ahmad Zahri Mirza Abdul Hamid v. AIMS Cyberjaya Sdn Bhd* [2020] 6 CLJ 557. On the principle of *stare decisis*, we are bound by the Federal Court's decision. The binding effect of superior court's decision is not an issue in this appeal.

[7] The sole issue in this appeal is whether the appellant is a permanent employee of the first respondent or was he employed on fixed term contract.

[8] We heard both oral and written submissions of parties on 1 July 2021. We adjourn the case to 13 August 2021 for decision. On 13 August 2021, we allow the appeal. Our reasons for doing so is as follows.

Background Fact

[9] The appellant started his employment with the first respondent on 15 May 2007 as a personnel coordinator Sapura 3000 on a fixed term contract of one year. His contract of employment is dated 14 May 2007 and the one-year period expires on 14 May 2008. Sapura 3000 is a vessel that carried out works at the first respondent's project site.

[10] Clause 2 of the 14 May 2007 contract of employment provides as follows:

> 2. Period of Employment
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> The Employee's term of employment shall be for a fixed period of one (1) year commencing on 15 May 2007. The Employer may in its absolute discretion extend the said period of employment for another one (1) year.

[11] Clause 8 of the same contract of employment provides as follows:

> 8. Termination
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> ...
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> Completion of Project
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> Your employment with us is on project basis. In the event that the project assignment completed earlier than your contract period, the Employer reserves the right to end the contract by giving two months notice or salary *in lieu* of notice.

[12] The said contract was renewed four times before its expiry or about to expire as follows:

(i) *vide* letter dated 12 May 2008, the contract was renewed for a period of three months commencing from 15 May 2008 to 14 August 2008;

(ii) *vide* letter dated 18 August 2008, the contract was renewed for a period of one month commencing from 15 August 2008 to 14 September 2008;

(iii) *vide* letter dated 12 September 2008, the contract was renewed for a period of one month commencing from 15 September 2008 to 14 October 2008; and

(iv) *vide* letter dated 10 October 2008, the contract was renewed for a period of three and half months commencing from 15 October 2008 to 31 January 2009.

[13] This is followed by three further renewal after the expiry of the contract and the period of employment was backdated as follows:

(v) *vide* letter dated 27 November 2012, the contract was renewed for a period of 46 months commencing from 1 February 2009 to 31 December 2012;

(vi) *vide* letter dated 21 February 2013, the contract was renewed for a period of 24 months commencing from 1 January 2013 to 31 December 2014; and

(vii) *vide* letter dated 15 September 2015, the contract was renewed for a period of 11 months commencing from 1 January 2015 to 30 November 2015.

[14] On 26 November 2015, the appellant received a letter from the first respondent stating his contract will expire on 1 December 2015 and that his last day of work is 30 November 2015.

[15] In reply to the first respondent's letter of 26 November 2015, the appellant sent an email to the first respondent's director, one Encik Mthlan Mahyudin enquiring about his termination benefit as he claims he has worked with the company for more than 24 months and is a permanent employee. The first respondent did not reply his email.

[16] On 14 January 2016, the appellant made a representation to the Industrial Relation Department. On 9 November 2016, the Minister of Human Resources refers his representation to the Industrial Court under s. 20(3) of the Industrial Relations Act 1967.

[17] At the Industrial Court, the appellant contended his contract of employment is not a genuine fixed term contract as his contract was renewed automatically and consecutively for seven years. That his dismissal was without just cause and excuse. He seeks for reinstatement with other termination benefits.

The Industrial Court Decision

[18] After considering the facts of the case, the issues, the case laws and the legal principles in respect of the burden of proof on the first respondent to show that the said contract of employment was a fixed term contract and that it had come to its natural end *via* effluxion of time, the second respondent conclude:

> [34] Thus, the Court finds that the company had discharged its burden of proof to show that the employment contract dated 14th May 2007, as well as the subsequent 7 extensions, between the claimant and the company were indeed genuine fixed term contracts.

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[38] As the Court finds that the employment contract was a genuine fixed term contract and thus the issue of dismissal does not arise, likewise the issue of reinstatement becomes a non-issue.

[19] In arriving at its decision, the Industrial Court makes the following findings of facts:

(i) there is no evidence whatsoever produced before the court that the claimant/appellant took issue with the company on the late renewals of his employment contract or on the backdating of his period of employment in respect of the last three extensions;

(ii) the claimant during cross-examination admitted that he understood and agreed to the terms and conditions of the contract dated 14 May 2007;

(iii) by admitting that he understood the terms and conditions contained in his employment contracts, it is evident that the claimant also understood that the said contracts were essentially fixed term employment contracts;

(iv) the claimant admitted during cross-examination that all the letters pertaining to the extensions did not state his employment status being of a permanent nature;

(v) claimant's own witness, CLW2, who was the Senior Manager of Human Resources and worked in the company from 2006 to 2015, agreed during cross-examination that the claimant's employment status was that of a fixed term employment contract and it remained so from the time the claimant commenced his employment until CLW2 left the company in 2015;

(vi) COW1, the Company's Human Resource Director from 2010 to 2012 testified that the claimant's position is not of a permanent nature as it depended on the tender/project obtained by the company from time to time;

(vii) the claimant's contract was not renewed upon its expiry on 30 November 2015 as there were no longer any projects undertaken by the company at the material time involving Sapura 3000 vessel and as such the claimant's services were no longer in need;

(viii) COW1 further testified during cross-examination that even the Sapura 3000 vessel had been sold off to Sapura 3500 Pte Ltd in January 2017;

(ix) the two emails dated 15 May 2009 and 21 May 2009 respectively referred to by CLW3, the former Director of Human Resources and Admin of the company to show there is a plan to convert claimant's

position as permanent staff were internal documents and they were never copied to the claimant. No such promise or assurance to place under permanent employment was ever given to the claimant by the company;

(x) CLW3 admitted that the decision whether to convert the claimant into a permanent staff rests with the CEO of the company. There was no evidence produced before this court that the CEO of the company had agreed to convert the claimant into a permanent staff nor was there a confirmation from the said CEO that the claimant's employment was permanent in nature;

(xi) the claimant's *curriculum vitae* also shows that his nature of work is project-based since 1983 and he had been moving from one company to another since 1983 until 2006 before joining the company in 2007;

(xii) the period of contract extensions given to the claimant by the company is not uniform in nature and ranges from one month to 46 months, which goes to show that the requirement of the claimant's services is very much dependent on tender/projects obtained by the company and the time period required to complete those projects; and

(xiii) the claimant admitted that he brought this action because he is dissatisfied that the company failed to renew his contract. This clearly evinces the state of mind of the claimant that he knew from the very beginning when he put pen to paper that his employment contract was really just a fixed term contract and that it was up to the company's discretion whether to renew the said contract upon its expiry.

Judicial Review Application

[20] Dissatisfied with the second respondent's decision, the appellant filed a judicial review application under O. 53 r. 3 of the Rules of Court 2012 at the Kuala Lumpur High Court to quash the second respondent's award dated 7 January 2019. The application is supported by three main grounds as follows:

(i) the second respondent had acted unreasonably and irrationally when it decided that the applicant/appellant was not a permanent employee but a contractual employee;

(ii) the second respondent failed to consider that the fixed term contract dated 14 May 2007 was a camouflaged contract so that the company/first respondent could terminate the employment of the applicant/appellant at any time without paying him termination benefits; and

(iii) the second respondent had erred in law and/or facts when it decided that the termination of the applicant's/appellant's employment by the company/first respondent was with just cause and excuse.

[21] Before the High Court, the appellant submitted that he was a permanent employee as his contract of employment was renewed successively without any application by the appellant and without any intermittent breaks in between. To support his submission, the appellant relies on a sealed order of the Federal Court in the case of *Ahmad Zahri* (*supra*) which decided, *inter alia*, as follows:

> 3. The question, "Does a contract of employment which is renewed successively without application by the employee and without any intermittent breaks in between in reality is a permanent employment?" is answered in affirmative.

[22] In response, the first respondent submitted that the Federal Court's Order has to be considered in its context as it was not intended to have a "blanket" effect over every situation where any employment contract is renewed without any intermittent break or application is automatically regarded as permanent employment without consideration of all other relevant facts of each case.

[23] The learned High Court Judge agreed with the first respondent's submission. This is what the learned High Court Judge said at para. 22 of Her Ladyship's grounds of judgment:

> This Court agrees with the 1st respondent's submission that the Federal Court's Order cannot be taken at face value as having formulated a general principle of law which has blanket application to every case involving the issue as to whether an employment contract was permanent or fixed term in nature. This is especially so, when this Court do not have the grounds of judgment from the Federal Court to appreciate the circumstances as to why it decided to answer the question in the affirmative.

[24] At para. [24] of Her Ladyship's grounds of judgment, the learned High Court Judge concluded:

> [24] This Court finds that the 2nd respondent had considered all relevant factors before arriving at its decision. The learned Chairman did not commit any error of law when it held that the question of whether there was a dismissal does not arise because of its findings that the fixed term contract of employment was genuine.

Grounds Of Appeal

[25] The appellant challenged the decision of the High Court on three points as follows:

(i) the learned High Court Judge erred in law and in fact in affirming the Industrial Court's decision that the contract of employment is a genuine fixed term contract;

(ii) the learned High Court Judge erred in holding Industrial Court had considered all relevant facts before arriving at its decision; and

(iii) the learned High Court Judge erred in failing to consider the Federal Court's decision in *Ahmad Zahri*'s case.

[26] With regard to point number (iii) above, we have already said the High Court could not be faulted because the grounds of judgment of *Ahmad Zahri*'s case was not available at the material time.

***Ahmad Zahri*'s Case**

[27] Briefly, the facts in *Ahmad Zahri*'s case are as follows. On 26 August 2009, the appellant received a contract for consultancy services from AIMS Data Centre 2 Sdn Bhd ("ADC") for a fixed term, ie, from 1 October 2009 to 30 September 2010 ("original contract"). Under the original contract, the appellant was entitled to be paid performance bonus. His contract of employment was renewed with similar terms and conditions until 2013. Except, from October 2012, the appellant was employed as consultant of AIMS Cyberjaya Sdn Bhd ("respondent"). For renewal from 1 October 2013, the respondent changes the terms of the appellant's employment by excluding the payment of performance bonus, which the appellant disagree. The respondent gave the appellant two months notice from 1 November 2013 until 31 December 2013 of expiry of his contract. The respondent releases the appellant from his employment with effect from 19 October 2013. The appellant made a representation under s. 20 of the Industrial Relations Act 1967. The matter was subsequently referred to the Industrial Court for adjudication for wrongful dismissal.

[28] The Industrial Court found the appellant was a permanent employee of the respondent and the purported "fixed term contracts" were not a genuine fixed term contracts based on the following facts:

(i) all contract of employment of the appellant were automatically renewed on the initiative of the company and not based on any application by the appellant;

(ii) the appellant was not a consultant but an employee of the company;

(iii) the appellant's function and position were not for a fixed duration but had an indefinite amount of time as was within the reasonable contemplation of parties; and

(iv) there was no break in the appellant's employment with the respondent.

[29] The Industrial Court's decision was affirmed by the High Court on judicial review application by the respondent. On further appeal by the respondent, the Court of Appeal set aside the decision of the High Court and the award of the Industrial Court.

[30] The appellant then filed a notice of motion for leave to appeal to the Federal Court. On 7 January 2019, the Federal Court granted the appellant leave to appeal on the following questions of law:

(i) whether a need for work permit is a material consideration in determining whether an employment contract is a genuine fixed term contract; and

(ii) does a contract of employment which is renewed successively without application by the employee and without any intermittent breaks in between, is in reality a permanent employment. For the purpose of this appeal, we are only concerned with question (ii).

[31] The Federal Court stated when deciding whether a contract of employment is a genuine fixed term contract or not, the court must consider three points as follows:

(i) the intention of parties;

(ii) the employer's subsequent conduct during the course of employment; and

(iii) nature of the employer's business and nature of work which an employee is engaged to perform.

[32] After considering the three points consideration, the Federal Court answered the leave question in the affirmative. At para. 67 of the judgment, the Federal Court states as follows:

> [67] With the principles outlined above in mind and based on the factual matrix of the instant appeal, we are satisfied that the appellant's contract of employment beginning with ADC before being terminated under the respondent, was not one-off, seasonal or temporary employment. It was ongoing, continuous employment without a break from 2009-2013.

[33] Before us, learned counsel for the appellant submitted *Ahmad Zahri*'s case applies to his case as his contract of employment had similar features ie his contract was renewed successively without a need for him to make application and without any intermittent breaks in between.

[34] In response, learned counsel for the first respondent submitted that the Industrial Court had in fact considered the three points in arriving at its decision, which was then affirmed by the learned High Court Judge. Therefore, it is submitted that the decision of the High Court should be upheld.

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Our Decision

[35] We disagree with the respondent. We find the following facts are not disputed:

(i) the appellant's contract of employment was renewed continuously and
B consecutively from 2008 to 2015;

(ii) all the renewals were done automatically by the first respondent without the need of the appellant making the application; and

(iii) although the period of the renewal is not uniform in that the renewal ranges from one month to 46 months, the renewals were backdated and
C had the successive effect.

[36] However, these undisputed facts were not considered at all by the second respondent when deciding the issue whether the appellant's contract of employment is a genuine fixed term contract or not. Instead, the second
D respondent had taken into consideration irrelevant points, namely the appellant knew and understood his contract of employment states it is a fixed term contract. Based on *Ahmad Zahri*'s case, we find the approach adopted by the second respondent is plainly wrong. This error is an error of law and fact committed by the second respondent.

E **[37]** We also find the second respondent's finding that the period of renewal which ranges from one month to 46 months show the appellant's nature of employment is project based is not supported by any evidence. The undisputed fact is the appellant was not employed for any specific project. The appellant's unrebutted evidence is he was involved in all the first
F respondent's project, both locally and oversea. Thus, in our view this is an error of fact committed by the second respondent.

[38] It is pertinent to note that from 1 February 2009 to 26 November 2012, a period of 45 months, the appellant was able to continue his employment without any contract. In our view, to allow the appellant to
G continue working in the absence of a contract for such a long period show the first respondent had treated the appellant as its permanent employee. That they had no intention to comply with the fixed term contract. Our finding is fortified with the two emails referred to by the appellant during the proceedings at the Industrial Court. These emails indicate there were plans
H by the first respondent's top management to absorb the appellant as a permanent employee. Admittedly, the plan did not materialise. But, these emails show not only the first respondent require the appellant's services but they also acknowledged that the appellant's nature of employment is not temporary or project based. This explain why the appellant had been in the
I employment of the first respondent for eight years from 2007 to 2015.

[39] For the aforesaid reasons, we agree with the appellant that the learned High Court Judge has erred in law and in fact in holding the second respondent had taken into consideration relevant facts and arrived at a correct decision. Based on the facts and circumstances of this case and applying the law as enunciated in *Ahmad Zahri*'s case, we are of the view that the appellant is a permanent employee of the first respondent. And the appellant's contract of employment is not a genuine fixed term contract. Therefore, we allow the appeal. We set aside the order of the High Court and quash the award of the Industrial Court.

[40] By consent of parties, we remitted the case to the Industrial Court for assessment of damages.